

California Regional Water Quality Control Board

Santa Ana Region



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Arnold Schwarzenegger
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February 18, 2010

Dr. Danielle Zacherl, Assistant Professor
Department of Biological Sciences
Southern California Ecosystems Research Program
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P.O. Box 6850
Fullerton, CA 92834-6850

**CLEAN WATER ACT SECTION 401 WATER QUALITY STANDARDS CERTIFICATION
FOR CALIFORNIA STATE UNIVERSITY, FULLERTON, PILOT STUDY TO
INVESTIGATE POTENTIAL FOR NATIVE OYSTER RESTORATION, NEWPORT BAY -
CITY OF NEWPORT BEACH, COUNTY OF ORANGE (SARWQCB REFERENCE NO.
302009-58)**

Dear Dr. Zacherl:

On December 21, 2009, staff of the Regional Water Quality Control Board, Santa Ana Region (Regional Board) received an application for a Clean Water Act Section 401 Water Quality Standards Certification (Certification) for the above-referenced restoration project. Researchers at the California State University, Fullerton, Department of Biological Sciences (applicant) propose to create a small native oyster bed along the tidelands of the Upper Newport Bay Channel (Channel; specific location below).

This responds to your request for certification that the restoration project (Project), described in your application and summarized below, will comply with State water quality standards outlined in the Water Quality Control Plan for the Santa Ana River Basin (1995 Basin Plan, and subsequent amendments). The application is deemed complete. Included with the application were the following:

- A copy of the California Environmental Quality Act (CEQA) documentation for the Project, that is, a Notice of Exemption issued on December 23, 2009, and stamped as received on December 30, 2009 by the County Clerk of the County of Orange. The Project qualifies for a Class 33 Categorical Exemption pursuant to California Code of Regulations, Title 14, Chapter 3, Section 15333 (Small Habitat Restoration Project).
- December 18, 2009, communications verifying that the United States Army Corps of Engineers (USACOE) concurs with the application of Nationwide Permit 18 to this Project. On December 18, 2009, the USACOE's Forrest Vanderbilt specified:
 - 1) that **no** formal correspondence (permit file number) would be sent; and

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- 2) that the United States Fish and Wildlife Service (Michelle Cox) explained that no Endangered Species Act Section 7 consultation with USACOE was necessary, because the Project will not cause adverse impacts to any special status species.
- A statement by the applicant that the California Department of Fish and Game (Carla Navarro, Lands Manager of the Upper Newport Bay Ecological Reserve) confirmed that the Project is exempt from the requirement for a Streambed Alteration Agreement, because the Project will not impact a channel.
- Statements by the applicant and the following agencies that the Project does not conflict with existing tideland jurisdiction:
 - 1) County of Orange Resources and Development Management Department (RDMD), Orange County Parks, landowner (Susan Brodeur, contact);
 - 2) City of Newport Beach, owner of adjacent land to the south (Chris Miller, contact, Harbormaster); and
 - 3) California Coastal Commission (Fernie Sy, contact).

The applicant indicates, from discussions with Orange County personnel, that no County encroachment permit appears necessary for this use of tidelands south of the Upper Newport Bay Ecological Reserve's existing boundary. However, the County of Orange has agreed to be a co-applicant and signatory for a Coastal Development Permit for the Project, as required by the California Coastal Commission.

- \$640 as payment for the base fee required to initiate the processing of a Certification. Since the sole purpose of the project is to restore or enhance the beneficial use of a water body, the \$640 initial (flat) fee is all that is required for this Project. This fee is based on the California Code of Regulations, Division 3, Chapter 9, Article 1, Section 2200 (a)(3) and is displayed on the Dredge and Fill Fee Calculator found on the State Board and Regional Board web sites.

Project Description

This pilot study will investigate the potential for restoration of the native Olympia oyster (*Ostrea lurida*) to the greater Newport Bay area. Biologists from the California State University, Fullerton, Department of Biological Sciences will create and monitor a small-scale *O. lurida* "bed," using replicate plots on an Upper Newport Bay mudflat. Along a 100-meter (m) linear swath that is 2 m wide (200 square meters (sm), or 0.0494 acre), the applicant will alternate 25 2X2m disturbed experimental plots with 25 2X2m "blank" interval plots (five of these interval plots will double as control plots that are lightly disturbed by a centralized polyvinyl chloride rod (PVC "tee"). Therefore, approximately half of the utilized area (100 sm; 0.0247 acre) will be disturbed.

Plot establishment will constitute a "fill" to waters of the U.S. and to waters of the state, through the intertidal (not subtidal) placement of biodegradable jute bags of oyster shell, unbagged shell, and/or PVC tees. No sediment removal or "dredge" will occur because surface disturbance, whether aerially exposed or underwater, will be minimal. Non-viable shell of the Japanese oyster (*Crassostrea gigas*) is anticipated to provide suitable substrate for the passive recruitment of ambient *O. lurida* spat (larvae).

The site is located along the base of bluffs that bound the west side of the Upper Newport Bay Channel, on County-owned tidelands ("Castaways Mudflat") adjacent to, and east of, Castaways Park and Cape Andover Street (City of Newport Beach). All of these locations are north of, and adjacent to, the Pacific Coast Highway bridge spanning the Channel.

Project and Regulatory Summary

1. Location: Between N33°37'7.56", W117°54'18.67"
and N33°37'17.04", W117°54'8.86"
Township 6S, Range 10W, Section 54,
USGS "Newport Beach" Quadrangle
2. Receiving water: Upper Newport Bay (estuarine mudflat)
3. Fill Volume: 8.38 cubic yards of non-viable shell material and negligible volume of plastic rods ("tees").
4. Fill Area: 0.0247 acre of disturbed mudflat (100 square meters, or 1,076 square feet), within a larger perimeter of 0.0494 acre (200 sm, or 2,152 sf) that could be disturbed.
5. Dredge volume: NA
6. Federal permit: NWP 18, per Clean Water Act Section 404

Onsite/Offsite Water Quality Standards Mitigation Proposed

The Project proponent will utilize planned Best Management Practices (BMPs) during implementation to minimize the controllable discharges of sediment and other wastes to waters of the state and of the United States.

The applicant will monitor for water clarity, dissolved oxygen, bacteria, phytoplankton, and temperature before, during, and after oyster bed establishment.

Project Compliance with the California Environmental Quality Act (CEQA)

Pursuant to California Code of Regulations (CCR), Title 14, Chapter 3, Section 15096, or the Guidelines for the California Environmental Quality Act (CEQA), the Regional Board as a responsible agency would consider an EIR, Negative Declaration, or a Notice of Exemption prepared by the lead agency in order to determine whether or not to approve a Certification. A responsible agency must ensure mitigation and/or avoidance of the direct and indirect environmental effects of those project components that it decides to approve.

The Regional Board issued a Notice of Exemption for the Project on December 23, 2009, citing Categorical Exemption Section 15333 (CEQA Guidelines) for Small Habitat Restoration Projects less than five acres in size that enhance habitats (Class 33 CE). Further, pursuant to Guidelines Section 15061(b)(3), the Regional Board found that the Project does not have the potential to have a significant effect on the environment and is

therefore exempt from CEQA. As required by CEQA Section 15096, the Regional Board has considered this Notice of Exemption in approving this Certification. The County Clerk of the County of Orange received, filed, and posted the Notice of Exemption on December 30, 2009.

This Certification is contingent upon the execution of the following conditions:

1. Construction activities shall not cause dissolved oxygen (D.O.) in Channel waters to be depressed below 5.0 mg/l, or if the background D.O. level is below 5 mg/l, the discharge shall not cause a further depression, as a result of controllable water quality factors. At appropriate locations up- and down-current of the project site, baseline levels of D.O. shall be determined for the restoration area before the project commences. D.O. monitoring shall be conducted daily during oyster bed construction. Test results shall be submitted to Regional Board staff within 48 hours of testing, via electronic mail.
2. Waters of the Region shall be free of changes in turbidity that adversely affect beneficial uses. Project activities shall not cause an increase in turbidity in Channel waters from a pre-construction baseline condition, when compared with turbidity monitored during construction, that exceeds the following:

<u>Baseline</u>	<u>Maximum Increase</u>
0-50 NTU	20%
50-100 NTU	10 NTU
Greater than 100 NTU	10%

Daily, at the conclusion of on-site Project construction activities, monitoring for turbidity shall be conducted in Channel waters at appropriate locations up- and down-current of the project site. Test results shall be submitted to Regional Board staff within 48 hours of testing, via electronic mail.

3. The Project proponent shall utilize already-planned Best Management Practices, or others as may be determined to be necessary, during implementation to minimize the controllable discharges of sediment and other wastes to waters of the state and of the United States.
4. Substances resulting from Project-related activities that could adversely affect water quality standards shall not be discharged to soils, or to waters of the state or the U.S.
5. Motorized equipment shall not be operated in a manner that results in the discharge of petroleum products or other pollutants from the equipment to waters of the state or the United States. Vehicles shall not be driven nor equipment operated in waters of the state on-site, except as necessary to complete the proposed Project.

6. Adherence to the requirements of this Certification does not relieve the proponents of this Project from compliance with requirements of local, county, other state, and federal agencies.

Pursuant to California Water Code Section 1058 and 23 CCR 3860, the following shall be included as conditions of all water quality standards certification actions:

1. Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Water Code Section 13330 and Article 6 (commencing with Section 3867) of this Chapter.
2. Certification is not intended, and shall not be construed, to apply to any activity involving a hydroelectric facility and requiring a FERC license or an amendment to a FERC license, unless the pertinent certification application was filed pursuant to Subsection 3855 (b) of this Chapter and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
3. Certification is conditioned upon total payment of any fee required under this Chapter and owed by the applicant.
4. Certification is conditioned upon submittal of a final report documenting compliance with these conditions as well as the general outcome of the Project.

This discharge is also regulated under State Water Resources Control Board (SWRCB) Order No. 2003-0017-DWQ, "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification" which requires compliance with all conditions of this Water Quality Standards Certification. Order No. 2003-0017-DWQ is available at www.swrcb.ca.gov/resdec/wqorders/2003/wqo/wqo2003-0017.pdf.

This letter constitutes a conditional water quality standards certification. Although we anticipate no further regulatory involvement, if the above conditions are changed, any of the criteria or conditions as previously described are not met, or new information becomes available that indicates a water quality problem, we may formulate Waste Discharge Requirements for the project.

In the event of any violation or threatened violation of the conditions of this Certification, the violation or threatened violation shall be subject to any remedies, penalties, process or sanctions, as provided for under state law. For purposes of Section 401(d) of the Clean Water Act, the applicability of any state law authorizing remedies, penalties, process, or sanctions for such violation or threatened violation constitutes a limitation necessary to assure compliance with the water quality standards and other pertinent requirements incorporated into this Certification.

In response to a suspected violation of any condition of this Certification, the Regional Board may require the holder of any permit or license subject to this Certification to furnish, under penalty of perjury, any technical or monitoring reports the Regional Board

deems appropriate. The burden, including costs, of the reports shall be reasonable in relation to the need for the reports and the benefits to be obtained from the reports.

In response to any violation of the conditions of this Certification, the Regional Board may add to, or modify, the conditions of this Certification as appropriate to ensure compliance.

Pursuant to CCR, Section 3857, we will take no further action on your application. This letter constitutes a technically conditioned water quality certification. Please notify our office five (5) days before construction begins on this project.

If you have any questions, please call Glenn Robertson at (951) 782-3259 or grobertson@waterboards.ca.gov, or Mark Adelson at (951) 782-3234, or madelson@waterboards.ca.gov

Sincerely,



GERARD J. THIBEAULT
Executive Officer

cc: U.S. Army Corps of Engineers – Forrest Vanderbilt
U.S. Environmental Protection Agency, Supervisor of the Wetlands Regulatory Office
– Tim Vendlinski (WTR-8)
U.S. Fish and Wildlife Service, Carlsbad – Michelle Cox
California Coastal Commission – Fernie Sy
California Department of Fish and Game, Upper Newport Bay Ecological Reserve, Lands Manager
– Carla Navarro
State Water Resources Control Board, DWQ - Water Quality Certification Unit – Bill Orme
Orange County RDMD – Susan Brodeur
City of Newport Beach – Robert Stein
City of Newport Beach, Harbormaster – Chris Miller

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